MOTION FILED
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No. 84-1737

IN THE
Supreme Court of the United States
October Term, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

AMERICAN COLLEGE OF PHYSICIANS,
Respondent,

MOTION FOR LEAVE TO FILE AND BRIEF FOR AMERICAN BUSINESS PRESS AS AMICUS CURIAE IN SUPPORT OF PETITION OF THE UNITED STATES FOR A WRIT OF CERTIORARI

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American Business Press (ABP) respectfully moves for leave to file the attached brief Amicus Curiae in support of the petition for a writ of certiorari of the United States in the instant proceeding.

The consent of counsel for the petitioner has been obtained. The consent of counsel for respondent was requested by letter and orally. On May 28, 1985 counsel for respondent informed counsel for ABP that respondent would not grant consent.

ABP is a publishers' association of well over 500 scientific, professional, and technical periodicals. ABP

member companies include, *inter alia,* Broadcasting Publications, Inc. (Washington, D.C.), Cahners Publishing Co. (Boston), Chilton Company (Philadelphia), Harcourt Brace Jovanovich Publications (Cleveland), Hearst Business Publishing (New York), International Thomson Communications, Inc. (Denver), Lakewood Publications, Inc. (Minneapolis), McGraw-Hill, Inc. (New York), Miller Freeman Publications (San Francisco), Pennwell Publishing Co. (Tulsa), Public Utilities Reports, Inc. (Arlington, Va.), Technical Publishing (New York and Barrington, Illinois) and Vance Publishing Corp. (Chicago). All members of ABP are for-profit, taxpaying publishing companies.

ABP was an active participant both in administrative hearings preceding the adoption of the 1967 Treasury Regulations which are at the heart of this case (Treas. Reg. 1.513-1 *et seq.*) and in the Congressional hearings preceding passage of the Tax Reform Act of 1969. That statute augmented the Unrelated Business Income Tax (UBIT) passed in 1950 and gave the 1967 regulations the force of law as explained in the attached *amicus* brief.

Passage of the UBIT and the 1969 statute was intended to protect taxpayers from unfair competition from businesses operated by tax-exempt organizations. The decision of the United States Court of Appeals for the Federal Circuit in *American College of Physicians* v. *United States,* 743 F.2d 1570 (1984), if allowed to stand, would nullify the express intent of Congress to apply UBIT to unrelated business income on advertising and similar activities earned by Respondent and others.

In October, 1984, ABP filed an *Amicus Curiae* Brief in support of the United States' Moton For Rehearing *En Banc* in the Federal Circuit case, *supra,* because of ABP's

grave concern about the destructive national effect that decision would have on enforcement of the UBIT.

ABP's interest herein is consistent with its past advocacy of fair competition as embodied in the UBIT. It is that Congressionally sanctioned principle which the Federal Circuit opinion below would destroy and which necessitated the petition of the United States and the Amicus Curiae brief of ABP.

WHEREFORE, ABP respectfully moves that its Motion For Leave to file Brief Amicus Curiae in Support of Petition of United States For a Writ of Certiorari be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether income derived by a tax-exempt medical association from the sale of commercial advertising space in its monthly journal is "unrelated business income" subject to tax under Sections 511 through 513 of the Internal Revenue Code.

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INTEREST OF AMICUS CURIAE AMERICAN BUSINESS PRESS

American Business Press (ABP), files this amicus curiae brief in support of the petition of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in *American College of Physicians* v. *United States*, 743 F.2d. 1570 (1984).

ABP is the nation's association of trade journal publishers. Its members publish over 500 scientific, profes-

sional, educational and other types of specialized periodicals circulated within the United States and throughout the world. In a wide variety of fields of endeavor for which the ABP members edit publications, there are competing periodicals issued by tax-exempt organizations. The following table shows examples of this head-to-head competition:

Tax Exempt	Taxpaying
Builder (National Association of Home Builders)	*Building Design & Construction* (Cahners Publishing Co.)
Chemical & Engineering News (American Chemical Society)	*Chemical Engineering* (McGraw-Hill, Inc.)
IEEE Spectrum (Institute of Electrical and Electronic Engineers)	*Electronic Design* (Hayden Publishing Co.)
Journal of Petroleum Technology (American Institute of Mining, Metallurgical and Petroleum Engineers)	*Oil & Gas Journal* (Pennwell Publishing Co.)
Nations Business (U.S. Chamber of Commerce)	*Industry Week* (Penton/IPC)
Science 85 (American Association for the Advancement of Science)	*Science Digest* (Hearst)

Many other examples could also be cited.

SUMMARY OF ARGUMENT

The issue before this Court is whether the Unrelated Business Income Tax (UBIT) passed by Congress in 1950

as amended in 1969 is to be overthrown by an ill-considered decision of the Federal Circuit.

The Federal Circuit's opinion is a prime example of judicial usurpation of the taxing power of Congress. It is an opinion so erroneous on its face as to exclude any mention whatsoever of the administrative agency regulation which had specifically been validated and given the force of law by Congress in 1969, 26 U.S.C. § 513(c). Neither the actions of the IRS or Congress made any difference to the Federal Circuit.

In the case at bar, unless this Court grants the petition of the United States so as to review the havoc that has been wrought and would be wrought if the Fedeal Circuit decision stands, unfair competition will flourish: *Today* it is advertisements appearing in *Annals* published by respondent in direct competition with taxpaying publishers. If the advertising proviso with all its legislative history falls, then *tomorrow* UBIT itself is in jeopardy.

This is no narrow issue limited to respondent and its *Annals*. The very regulation so glaringly ignored by the Federal Circuit contains an example (Example 7) which precisely describes respondent (*see* Government Petition, p. 51a). That regulation declared the advertising profits of respondent taxable. Congress then validated those regulations through the passage of 26 U.S.C. §513(c) in 1969, expressly stating that it was giving the IRS advertising regulations the force of law.

Chief Claims Court Judge Kozinski enforced the IRS Regulations and the Act of Congress by declaring the advertising profits of the respondent taxable. The Federal Circuit gave no respect whatsoever to the lengthy legislative history in which Congress explained why it passed not only UBIT, but also Section 513(c), wherein Con-

gress specifically indicated its clear intention that advertising, *all* advertising, is not a purpose for which *any* organization was granted tax exemption.

If ever a case cries out for appellate correction of judicial error, this is that case.

There is impact of deep national significance in this case because it bears so importantly on unfair competition by tax-exempt organizations with taxpayers, entirely apart from the complete disregard the Federal Circuit has demonstrated for both the Treasury Regulations and the Congress of the United States by its usurpation of their power. Moreover, if the tax system is to be fair, it cannot be construed to exempt identical commercial activity A and tax identical commercial activity B without causing disrespect for the tax system, as well as loss of tax revenues resulting from so discriminatory a practice.

ARGUMENT

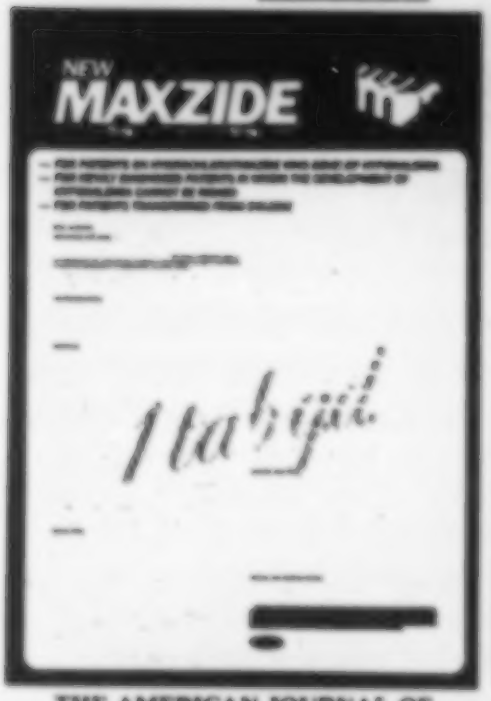
I. The UBIT Was Enacted to Preclude the Kind of Unfair Competition That Tax-Exempt Publishers Like Respondent Wage Against Taxpayers

The pictures on the facing page demonstrate more graphically than words what this case is all about. The advertisements for Maxzide, a prescription drug manufactured by Lederle, reproduced here in reduced size and in black and white, appeared in full color in more than 25 publications including the following:

Annals of Internal Medicine (Annals), published by American College of Physicians (ACP) a nonprofit §501(c)(3) organization, respondent in case at bar.

MAXZIDE IN TAX-EXEMPT AND TAXPAYING PERIODICALS

ANNALS OF INTERNAL MEDICINE
JANUARY 1985 (TAX EXEMPT)



THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION
FEBRUARY 8, 1985 (TAX EXEMPT)

THE AMERICAN JOURNAL OF MEDICINE
MARCH 1985 (TAX PAYING)

MEDICAL ECONOMICS
MARCH 4, 1985 (TAX PAYING)

BEST AVAILABLE COPY

The American Journal of Medicine, published by Technical Publishing Company, a subsidiary of taxpaying Dun & Bradstreet.

The Journal of the American Medical Association, published by AMA, a nonprofit §501(c)(6) organization.

Medical Economics, published by the taxpaying International Thomson Business Press.

Since 1950, courts on many occasions have reemphasized the primary UBIT purpose of preventing unfair competition. The Fifth Circuit in *Louisiana Credit Union League* v. *United States*, 693 F.2d 525, 539 (1982) held:

> A fair reading of the legislative history of the Revenue Act of 1950 indicates that Congress indeed was concerned that exempt institutions choosing to enter the market place would enjoy an unfair advantage over their taxpaying competitors. See H.R. Rep. No. 3219, 81st Cong., 2d Sess., reprinted in 1950-2, C.C. 380; S. Rep. No. 2375, 81st Cong., 2d Sess., reprinted in 1950-2 C.B. 483; 96 Cong. Rec. 9351, 9366 (1950) (statement of Mr. Lynch). *Congress reiterated its interest in preventing unfair competition when section 513 was amended in 1969.*[11] Similar language accompanied further amendments in 1978. [Footnotes omitted and emphasis supplied]

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[11]The 1969 amendment to UBIT referred to in *Louisiana Credit Union* was enacted primarily to deal with advertising in tax-exempt periodicals, particularly in medical journals. This is the Congressional enactment before the Court in the case at bar.

In *Hope School* v. *United States*, 612 F.2d 298, 303 (1980), the Court of Appeals for the Seventh Circuit said that unfair competition is "the primary consideration" when a court determines whether a tax exempt organization is conducting an unrelated trade or business.

The Second Circuit and the Sixth Circuit like the Fifth and Seventh Circuits have also declared that the purpose of Congress in extending the income tax to the unrelated business income of tax-exempt organizations was to eliminate the unfair competitive advantage over taxpayers that tax-exempt organizations like respondent enjoy when they engage in an unrelated trade or business. *Rensselaer Polytechnic Institute* v. *Commissioner of Internal Revenue*, 732 F.2d 1058, 1061 (2d Cir. 1984); *Service Bolt and Nut Co.* v. *Commissioner of Internal Revenue*, 724 F.2d 519, 524 (6 Cir. 1983).

II. The Federal Circuit Decision Frustrates the Clear-cut Purpose of the 1969 UBIT Amendment As Recognized At The Time Of Its Adoption by Friend and Foe Alike

The Government's petition sets forth the legislative and regulatory history of the UBIT and its application to advertising, specifically medical advertising. As the petition indicates, after the Treasury issued regulations in 1967, (Treas. Reg. 1.513-1, 32 Fed. Reg. 17657 (1967)) a wave of anguish arose from tax sanctuary publishers, including respondent, AMA, and tax-exempt organizations not wishing to pay any tax on their advertising profits.

In the 1969 Congressional hearings, ABP as well as other taxpaying organizations and publishers like the National Newspaper Association, Second Class Mail Publications, Inc., the Agricultural Publishers Association, Fair-

child Publications, Atlantic Monthly, McGraw-Hill, and others testified in favor of the 1967 Treasury Regulations. The taxpaying press urged that the pending tax reform legislation before Congress be adopted because it reduced unfair competition by treating both taxpaying and non-taxpaying competitors alike.

It is significant in the case at bar that in the 1969 hearings before the House and Ways and Means Committee, the spokesman for respondent was the same Dr. Edward Rosenow who testified in the Claims Court before Judge Kozinski in 1983. In 1969, Dr. Rosenow testified:

> We believe that the broad sweep of the new regulations is too big because purely educational organizations are caught up with noneducational organizations. The new Treasury regulations have the effect of *conclusively presuming that advertising income derived from the college's publication constitutes taxable unrelated trade or business income.* [Emphasis supplied][2]

Hearings on Tax Reform, 1969, before the House Ways and Means Committee, 91st Cong., 1st Sess., pt.4, at 1113.

Dr. Rosenow argued that advertising in *Annals* had an educational value justifying tax exemption, and that it contributed importantly to the tax-exempt purpose of the respondent. *Id.* at 1111-1113.

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[2]By the time 1983 rolled around the respondent had rolled around too, 180° around, Congress to the contrary in 1969 notwithstanding. Respondent told Judge Kozinski that advertising was related, contributed importantly its tax-exempt function, was educational, and was not subject to income tax. It is as though IRS never issued any regulations, that Dr. Rosenow had not testified 180° differently, and that Congress had never *rejected* respondent's arguments.

Before the same Ways and Means Committee, counsel for AMA testified:

> [I]n the typical case taxation of the advertising income of tax-exempt publications under the new regulations will effectively deny these publications tax exemption. * * * The apparent philosophy behind these new advertising regulations is to discard the test of relatedness and to tax exempt organizations on the basis that their publications compete with those published by commercial publishers. *Hearings on Tax Reform, 1969, before the House Ways and Means Committee, 91st Congress, 1st Sess., p. 1260.*

The American Association of Petroleum Geologists stated that the Regulations would "declar[e] that all such advertising income is *per se* unrelated business income." *Id.* at 1379.

The Association for Childhood Education International said that the Regulations "would ha[ve] the effect of establishing a *conclusive presumption* that any advertising carried in a tax-exempt organization's periodical is unrelated for the purposes of determining the taxability of income therefrom." *Id.* at 1412. [Emphasis supplied]

The parade of witnesses desiring to conduct tax exempt business also included spokesmen for the Society of National Association Publications, the United States Chamber of Commerce, the American Chemical Society, the American Society of Association Executives, the Institute of Electric and Electronics Engineers, the American Geological Institute, and an assortment of others.

But Congress expressly *rejected* Dr. Rosenow's arguments against the Regulations and those of the other opponents of UBIT: The House Ways and Means Commit-

tee, the Senate Finance Committee, the House of Representatives and the Senate voted that *all* advertising in tax-exempt periodicals is an exploitation[3] of the tax-exempt function of nonprofit organizations, and that profits earned thereon are subject to income tax for respondent, just like everybody else.

Both Houses of Congress issued reports which declared advertising income taxable, regardless of the publisher's identity or profession, regardless of whether the organization was classified 501(c)(3) or 501(c)(6), or any other 501 classification.

Thus, following House Committee hearings on the 1967 Treasury Regulations, the Ways and Means Committee issued a report on H.R. 13270, H. Rep. No. 91-413. This report stated that the regulations were consistent with Congress' original purpose in enacting the UBIT, and that the regulations were valid. And because of the controversy over them, Congress decided to give them the force of law. The report states:

> Because of the ensuing controversy over this problem *your committee has decided to deal with this subject by legislation*. In general, it is in agreement with the purpose of the regulations. Your Committee believes that a business competing with taxpaying organizations should not be granted an unfair competitive advantage by operating tax free unless the business contributes importantly to the exempt function. It has con-

[3]It works this way: If the publishing of editorial content in a tax-exempt organization's periodical is a related, tax-exempt function, then the sale of advertising in that same periodical is exploitation of the exempt (editorial) function and the profits earned on that advertising are taxable. The Treasury Regulations so provide, and Congress enacted those regulations into law in 26 U.S.C. § 513(c).

> cluded that by this standard, *advertising in a journal published by an exempt organization is not related to the organization's exempt functions, and* therefore it believes *that this income should be taxed.* [Emphasis supplied]

2 U.S. Cong. and Admin. News 1695 (1969)

Elsewhere in the same report, the Committee explained the reasons why it was amending §513 of the Tax Code by adding a new subsection (c) entitled *"Advertising, etc., activities"* which would apply to *all* advertising, including *medical advertising* like that contained in *Annals*. The report states:

> Finally, the Internal Revenue Service promulgated regulations on December 12, 1967 which clarified the law with respect to the conduct of an unrelated trade or business carried on as part of an exempt function. *This regulation mainly affected the advertising income of publications such as medical journals.* There has been controversy over the validity of these regulations. *Your committee wants to make it clear that such regulations are valid.* [Emphasis supplied]

Id. at 1690.

After Senate hearings, Senate Finance Committee Report No. 91-552 similarly explained the purpose of the amendments to §513 of the Tax Code, particularly subsection (c), entitled "Advertising, etc., activities". The Senate Report states:

> Present law. — In December 1967, the Treasury Department promulgated regulations under which the income from advertising and similar activities is treated as 'unrelated business income' even though such advertising for example may

> appear in a periodical related to the educational or other exempt purpose of the organization.
>
> General reasons for change. — The Committee agrees with the House that the regulations reached an appropriate result in specifying that when *an exempt organization carries on an advertising business in competition with other tax-paying businesses, it should pay a tax on the advertising income.* The statutory language [the 1950 Act] on which the regulations are based, however, is sufficiently unclear so that substantial litigation could result from these regulations. For this reason, *the committee agrees with the House that the regulations, insofar as they apply to advertising and related activities, should be placed in the tax laws.* [Emphasis supplied]

Id. at 2104.

One thing comes through loud and clear from the 1969 Congressional hearings. *All* who testified knew if the law passed, that advertising would not qualify as a tax-exempt activity, that it was not related to any tax-exempt purpose, and that it did not contribute importantly to any tax-exempt purpose.

In *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) this Court was called upon to interpret legislation which, like UBIT, was enacted to further "a policy of competitive equality." Maintenance of competitive equality has vast national significance and impact, involving not only fair competition, but in the case of UBIT and §513(c) the very integrity of and respect for the tax system itself.[4] In *Walker*, this Court held:

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[4]The national policy of tax-free advertising which would follow the Federal Circuit's decision would cause a scoffing at and disrespect for the nation's income tax laws because advertising by its very nature is

> *It is not for us to construe the Acts as to frustrate this clear-cut purpose so forcefully expressed by both friend and foe of the legislation at the time of its adoption.* To us it appears beyond question that Congress was continuing its policy of equalization first adopted in the National Bank Act of 1864. [Emphasis supplied].

In the 1969 Congressional hearings on the Treasury Regulations there was no dispute by either side over the meaning of the regulations. The record clearly shows that respondent told Congress it would have to pay a tax if the legislation passed. Respondent's tax-paying competitors told Congress that it was unfair competition for the same advertisement to appear in a taxpaying periodical and a tax-exempt periodical without equal tax applying to that same advertisement *wherever* it appeared.

Incredibly in 1984, *15 years after the 1969 UBIT legislation*, the Federal Circuit, overruling the considered opinion of Chief Judge Kozinski, substituted its views for the policy decision which Congress made in the Tax Reform Act of 1969, and declared Congress to be ignorant of its own purposes when it applied the UBIT to advertising.

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so flagrantly commercial that it cannot be tax-exempt without subjecting the tax system to ridicule. This device can also be applicable to other types of activity once respondent's nose in this camel's tent is applied to a myriad of other exploitable tax-exempt functions.

III. The Federal Circuit Decision Not Only Invalidated Long Standing Treasury Regulations Which of Themselves Were Entitled to Great Weight But Also Disregarded the 1969 Congressional Codification of the Treasury Regulations

"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the agency charged with its administration." *Unemployment Compensation Commission* v. *Aragon,* 329 U.S. 143, 153 (1946); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); *Zenith Radio Corp.* v. *United States,* 438 U.S. 443, 450 (1978); *Ford Motor Credit Co.* v. *Cenance,* 452 U.S. 155, 159 (1981).

In the instant case the Court of Appeals ignored not only the language of section 513(c) of the Revenue Code and the legislative history of the 1969 enactment of section 513(c), it compounded its error by invalidating *sub silentio* the 1969 Treasury Regulations, including Example 7 which fits exactly respondent's conduct of an advertising business in exploitation of *Annals* editorial content.[5] In the process, the Court of Appeals closed its eyes to the force of law which Congress expressly gave the 1967 Treasury Regulations on advertising when it enacted the Tax Reform Act of 1969.

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[5]Treasury Regulation 1.513-1(iv) reproduced at p.50(a) of the Government's petition precedes Example 7 which appears at p. 52.(a) therein, Example 7 *modifying* Section (iv). Section (iv) taxes exploitation of exempt functions for commercial purposes unless the commercial activity contributes importantly to the accomplishment of an exempt purpose. *Example 7 then proceeds to hold that advertising in a journal containing editorial content like that in ACP's Annals does not contribute importantly to the accomplishment of any exempt purpose and the income from that advertising is taxable as unrelated trade or business.*

IV. Since the United States Court of Appeals for the Federal Circuit Is a Court of National Jurisdiction Its Decision in the Case At Bar Unless Ultimately Reversed Will Make That Court a Tax Haven Not Only For Respondent But For a Wide Number of Nonprofit Organizations Which Conduct Tax-Exempt Businesses Which Compete With Taxpayers

As the Government correctly points out in its petition (p. 25), one urgent reason this case has nationwide impact is because the Federal Circuit is a court of nationwide jurisdiction: the Federal Circuit will become a tax haven not only for respondent and other medical associations, but also for all manner of non-profit organizations which will claim that advertising published in their journals is "educational", or "contributes importantly to their tax-exempt purpose", or is "related" to their tax-exempt purpose. They will claim that their advertising is therefore tax-exempt, notwithstanding the fact that Congress voted repeatedly and specifically in 1969 to declare advertising in general, and medical advertising in particular, unrelated to any tax-exempt purpose and therefore subject to UBIT.

IRS presently has at least 200 unrelated business income tax cases with various nonprofit organizations. (Government's petition, p. 23) A flood of tax refund claims into the Federal Circuit by these and other nonprofit organizations will be a certainty unless this Court overturns the error of the Federal Circuit.[6]

Significantly, the ink on the decision in respondent's case was hardly dry before the American Medical Associa-

[6]The May 13, 1985 issue of the "Non-Profit Organization Tax Letter", a newsletter the title of which is self-explanatory, cites a recent statement by IRS Commissioner Egger that there are 871,000 exempt organizations, of which 353,000 are charitable organizations and 53,000 are "business leagues".

tion indicated that it plans to dismiss the UBIT advertising tax refund claims it previously filed and which are now pending in the Northern District of Illinois (Civil Action No. 82-C-7213, filed November 23, 1982). This action would clearly be the first step in moving AMA's claims into the Federal Circuit. (*See* p. 25 of the Government's Petition.)

Moreover, in its answer opposing ABP's Motion to Intervene in the *AMA* case in Chicago, the American Medical Association doctors cited the instant decision affecting the doctors in the American College of Physicians as the law of the land, justifying non-payment of taxes by AMA on its advertising income. The AMA answer to ABP's motion in the Chicago case states:

> Because the Federal Circuit reviews all decisions of the Claims Court regarding income tax refund claims, and because the Claims Court is available to all taxpayers who wish to file a refund claim, the *American College* decision, not any decision in this case, effectively establishes the law with respect to the 'relatedness' issue.

Memorandum of AMA in Opposition to Motion of ABP for Leave to Intervene, March 25, 1985, p. 11.

For purposes of the UBIT there can be no difference between AMA doctors and respondent's doctors. In fact, their memberships considerably overlap.[7]

The revenue impact of the *ACP* decision will be heavy. In the Chicago litigation, AMA witness Thomas Hannon,

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[7]Respondent is a § 501(c)(3) organization, AMA is a § 501(c)(6) organization. Theoretically 501(c)(3) can not lobby, whereas 501(c)(6) can. But advertising in *The Journal of the American Medical Association*, respondent's *Annals*, and in journals published by their taxpaying competitors is identical.

Executive Vice President for Corporate Publishing and Management Services of AMA, like respondent in this case, admitted in depositions and interrogatories that AMA's medical publications compete for substantial advertising revenues with taxpaying publishers, including members of ABP. Mr. Hannon at p. 15 of his deposition (May 30, 1984) stated:

> *The 20 leading pharmaceutical companies in the country that represent the largest share of advertising in the medical field* literally run in 'Medical Economics' [an ABP member publication] and *our* [AMA] publications, almost all of them. [Emphasis supplied]

According to recent responses filed by AMA in the same case, AMA had $13,189,298.00 of unrelated business income between 1975 and 1978, the years at issue in that case. Unless *ACP* is reversed, the amounts will be much greater for subsequent years for respondent, for AMA, for all nonprofit medical publications, and for all tax-exempt journals generally. Certainly this is no time for the Federal Circuit to *open* tax loopholes, particularly loopholes Congress closed in 1950 and 1969.

If the Internal Revenue Service is required to read every advertisement in every nonprofit periodical in order to make the ad-by-ad determination accurately forecast by the Goverment in its petition (p. 24), administration of the UBIT would cease for all practical purposes and enforcement of the explicit directive of Congress would wither away.

CONCLUSION

Congress knew exactly what it was doing when it proscribed exploitation of exempt functions by tax-exempt organizations and applied this prohibition across the board. It was not a ukase applying to all tax-exempt organizations *except* the *Annals* of the American College of Physicians, as respondent would now have this Court believe. There is no exception in the UBIT for respondent or anyone else.

As this Court said in *First National Bank, supra,* "It is not for us to frustrate this clear-cut purpose so forcefully expressed by both friend and foe alike at the time of its adoption". Yet that is what the Federal Circuit did.

WHEREFORE, ABP respectfully requests the Court to grant the Government's petition for a writ of certiorari.

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June 5, 1985

APPENDIX A

AFFIDAVIT OF JOHN K. ABELY IN SUPPORT OF MOTION OF AMERICAN BUSINESS PRESS FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF SUGGESTION OF UNITED STATES FOR REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPEAL NO. 84-715

THE AMERICAN COLLEGE OF PHYSICIANS
Appellant

v.

THE UNITED STATES
Appellee

STATE OF NEW YORK)
) SS
COUNTY OF NEW YORK)

I, John K. Abely, being duly sworn, depose and say:

1. That I am President of Technical Publishing Co., an independent division of the Dun and Bradstreet Corporation. I have been professionally engaged in publishing for 27 years.

2. Technical publishes 21 medical, technical and business periodicals. These include the *American Journal*

of Cardiology, the *American Journal of Medicine,* the *American Journal of Surgery* and *Cutis* (a journal publishing clinical articles in dermatology), which comprise the Yorke Medical Group of Technical Publishing. All of our publications are published for-profit and are tax-paying journals.

3. Other periodicals published by Technical include *Dun's Business Monthly, Datamation, Plant Engineering* and *Solid State Technology And Research and Development.*

4. I have read the decision of the United States Court of Appeals for the Federal Circuit in *American College of Physicians* v. *United States,* slip op. no. 84-715. I am shocked by the conclusion in the Court's Opinion that the commercial advertising in the *Annals of Internal Medicine* should be tax-exempt. This decision, in my opinion, gives publishers of non-profit journals, which compete with tax-paying periodicals, a green light to again engage in unfair competition with us and other publishers.

5. At Technical, and I know I reflect the view of the 500 specialized tax-paying periodicals which belong to the American Business Press, we thought the issue of the unrelated business tax had been put to rest in 1969 when Congress specifically applied the unrelated business tax to advertising. Now to my amazement, the Court has said our competitors do not have to pay taxes on their advertising profits, because the advertising in *Annals* is allegedly related to the tax-exempt function of the owners of *Annals.* (slip op. at 18).

The same type of advertising appearing in *Annals* appears in our *American Journal of Medicine* and other medical periodicals. Each of our four medical journals

limits the type of advertising in the same manner as *Annals*. Each of our journals has a distinguished board of doctors who provide peer review as does *Annals*. From time to time, the same doctors who provide peer review for *Annals*, perform the same function for our medical journals.

The advertisements carried both in *Annals* and our journals do not announce new developments alone, but are printed month after month, as is the case with most commercial advertising, in order to make it effective.

Advertisements are aggressively solicited by salesmen representing the American College of Physicians. These solicitations are made to pharmaceutical manufacturers and to their advertising agencies. Out on the street the battle is for a share of an advertiser's budget: there may not be enough to place the same advertisement in both *Annals* and one of our journals. Advertisements published in *Annals* are sold at comeptitive rates in *Annals* and in our journals: the difference is that if this decision is upheld, *Annals* will not have to pay taxes on its advertising profits, but we will. This is unfair competition.

6. On February 25, 1969, when Congress held hearings on the unrelated business tax, Congress was particularly concerned with application of the tax to advertising in non-profit journals like *Annals*. Ralph Hench, then President of our medical publications, testified before the House Ways and Means Committee in support of the IRS regulations of 1967 which applied the unrelated business tax to advertising profits of nonprofit journals like *Annals*. He emphasized the unfair competition that his competitors like the *AMA Journal* and *Annals* were able to mount against him by virtue of their tax exemption.

7. I note that Dr. Edward Rosenow, Executive Director of *Annals*, appeared in the same hearing as Mr. Hench. And I further note that Congress ruled as Mr. Hench and others thought and not as Appellant and other would-be tax avoiders urged.

Nothing has happened in the last 15 years in the world of medical publishing to make the testimony of Mr. Hench any less relevant: if anything, there has been a proliferation of medical journals – some nonprofit, some for-profit. All of them are fiercely battling in a competitive marketplace for the medical advertising dollar. There should be no unfair tax advantage to any.

8. The reason why pharmaceutical companies advertise in medical journals is because they want to sell their products to readers who are in a position to buy their products. This is true of *Annals,* of our own journals and of all other journals that carry advertising. Let's face it: The purpose of advertising is to sell products. If *Annals* does not agree with this, it has a clear option: Let it provide its advertising without charge. Then there would be no income and therefore no tax.

9. I attach as Attachment 1 an advertisement *Annals* bought and paid for in *Medical Advertising News.* The purpose of this advertisement is to solicit additional advertising for *Annals.* Appropriately, *Annals'* advertisement is entitled "The Bottom Line," a financial term, not a term usually associated with nonprofit organizations. The advertisement gives both the names and telephone numbers of *Annals'* "sales representatives." It strikes me as anomalous that an organization exempt from Federal taxation has "sales representatives."

10. *Annals* has a sister tabloid publication published by the same nonprofit organization. Its title is *"The*

Observer." Annals conducts a joint advertising campaign with *The Observer.* Attachment 2 is an advertisement urging advertisers to advertise in both periodicals. I note that the advertisement states "Plan on scheduling *ACP Observer* and *Annals* to cash in on the clout of the stellar Journal/Tabloid Team." The emphasis is on "cash[ing] in." How is "cashing in on the clout" of any tax-exempt organization related to any tax-exempt purpose?

11. Back issues of *Annals,* upon request, are bound into volumes. When so bound, the advertising pages are deleted because, according to *Annals,* these pages are "extraneous material." (*Annals,* March 1983, p. I-117). That *Annals* follows this practice is further proof that the true purpose of *Annals'* advertising is to make money for the doctors who make up the ownership of the periodical.

12. If the three-judge panel's decision in this proceeding is upheld, its effects will be widespread, going far beyond the medical publishing field. All types of nonprofit journals will claim their advertising is "substantially related" to their tax-exempt purpose. We heard all these arguments in 1969 when we testified before Congress. Congress turned those arguments down, but unfortunately, the three-judge panel now has opened up a loophole for tax-exempt advertising and unfair competition. Trade associations, universities, professional societies and others which publish journals will even more aggressively market their journals to advertisers to take competitive advantage of the Court's Opinion.

In the meantime, journals like our *American Journal of Medicine* which pays taxes, will have to compete for the same advertising dollars as the *Annals of Internal Medicine.*

/s/ John K. Abely
John K. Abely

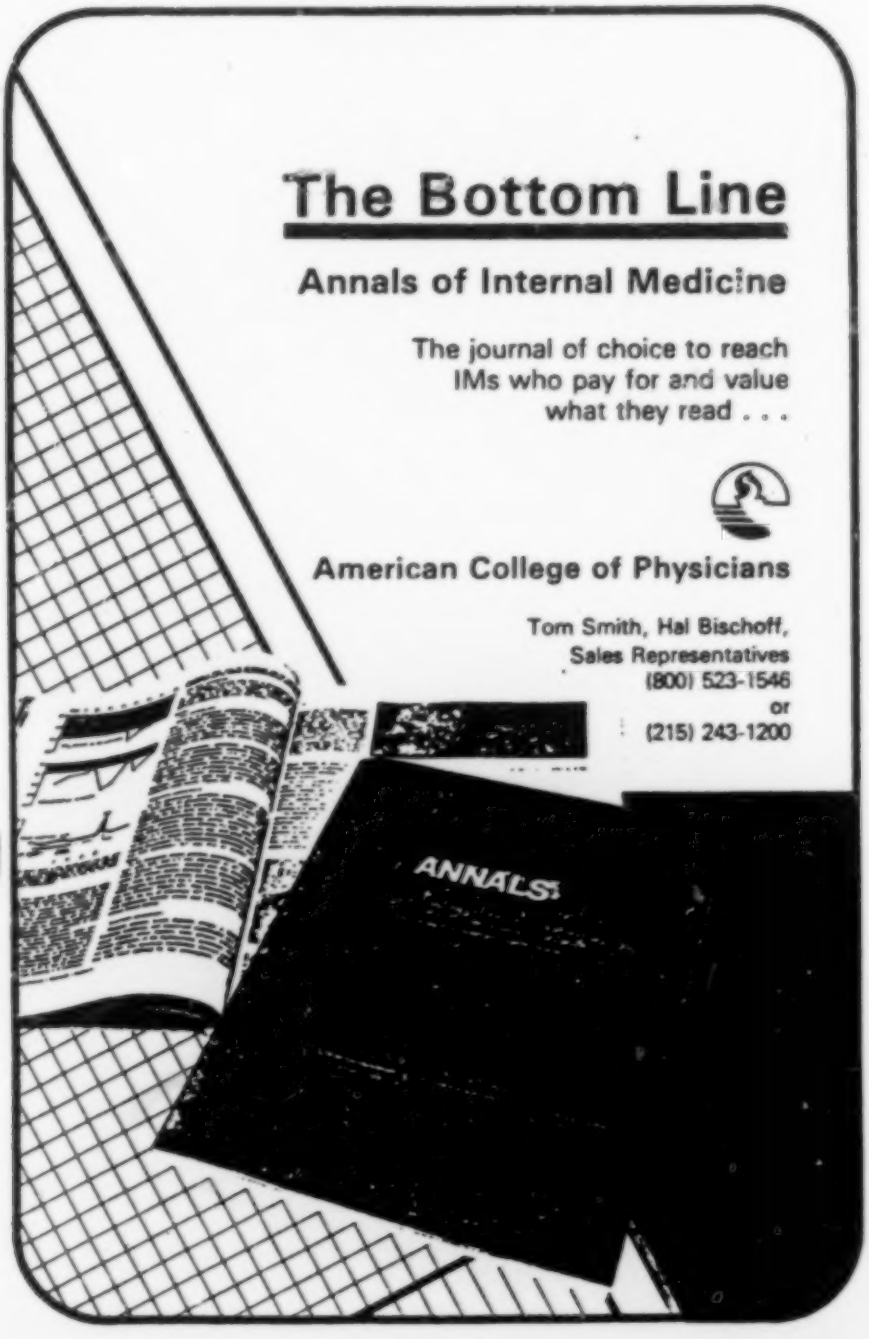
Sworn and subscribed before me this 29 day of October, 1984.
My commission expires
STATE OF NEW YORK
NEW YORK COUNTY

JOSEPH J. ZACCARIA, Notary Public
State of New York, 31-437550
Qualified in New York County
Commission Expires March 30, 1985

/s/ Joseph J. Zaccaria
Notary Public

APPENDIX A

Attachment No. 1


The Bottom Line
Annals of Internal Medicine
The journal of choice to reach IMs who pay for and value what they read . . .
American College of Physicians
Tom Smith, Hal Bischoff,
Sales Representatives
(800) 523-1546
or
(215) 243-1200
ANNALS

[Reproduced from *Medical Advertising News*, April 1984]

BEST AVAILABLE COPY

APPENDIX A

Attachment No. 2

You don't need a telescope to spot the newest star in the IM universe. It's ACP OBSERVER, teammate of the IM superstar, ANNALS OF INTERNAL MEDICINE.

In just one year ACP OBSERVER has added editorial pages and editorial color . . . has switched to better stock . . . has added several high-interest editorial features. And where once there were only a modest few "A"-size ads, now 4-color 2, 4 and 6-page spreads are showcased in every issue!

By including ACP OBSERVER on your schedule, you reach the entire membership of the American College of Physicians. Use this lively, interesting, and informative tabloid to reach the IM when he's relaxed and receptive . . . and eager to know the latest news from Washington, or the pros and cons of medicine's newest controversy.

Plan on scheduling ACP OBSERVER and ANNALS to cash in on the clout of the stellar Journal/Tabloid Team. You reach every ACP member twice a month, plus 46,000 non-members once a month when you use both. Add frequency discounts for the best buy in IM coverage.

For more information contact:

Tom Smith
Hal Bischoff
American College of Physicians
4200 Pine Street
Philadelphia, PA 19104
215 243-1200

ANNALS of Internal Medicine

OBSERVER

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